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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

ANDRES SEGURA and LUZ MARINA COLON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the introduction into evidence of contraband discovered pursuant to a search warrant obtained after a nineteen hour illegal entry, seizure and physical occupation of a dwelling violates the Constitutional requirement that a magistrate must find probable cause and issue a warrant *before* the police violate the privacy of the home.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT 2
SUMMARY OF ARGUMENT 6
ARGUMENT 11

I. THE ENTRY INTO AND SEIZURE BY DRUG ENFORCEMENT AGENTS OF PETITIONERS' DWELLING WITHOUT A WARRANT AND IN THE ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATED PETITIONERS' FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES 11

A. Belief by the Police that Contraband is Within a Home Does Not Allow Them to Make a Warrantless Entry and Seizure 11

B. The Fourth Amendment Prohibits the Police From Entering a Home Without a Warrant for the Purpose of Making an Arrest 17

C. No Exigent Circumstances Were Established Which Would Justify the Warrantless Entry, Occupation and Seizure 18

II. AN AFFIRMANCE OF THE LOWER COURT HOLDING THAT THE EVIDENCE WAS PURGED OF ITS ILLEGAL TAINT MERELY BECAUSE A

SEARCH WARRANT WAS OBTAINED BEFORE THE EVIDENCE WAS INVENTORIED OR REMOVED WOULD RENDER THE WARRANT CLAUSE OF THE FOURTH AMENDMENT MEANINGLESS 22

A. The Entry Into and Occupation by the Agents of Petitioners' Dwelling for Nineteen Hours Resulted in a *De Facto* Seizure of the Contents of the Home 22

B. The Doctrines of "Attenuation" and "Independent Source" Cannot be Invoked Because the Contraband Seized Was Primary Rather Than Derivative Evidence 29

III. THE POLICE ACTION WAS SO FLAGRANTLY ABUSIVE OF PETITIONERS' RIGHTS, AND SO LACKING IN GOOD FAITH, THAT AN "IMPOUNDMENT ALTERNATIVE" SHOULD BE REJECTED, THE EXCLUSIONARY RULE SHOULD BE APPLIED, AND THE EVIDENCE SEIZED SHOULD BE SUPPRESSED 35

A. The Purposes of the Exclusionary Rule Would Be Achieved By Its Application In This Case 35

B. The "Good-Faith" Exception to the Exclusionary Rule Does Not Apply In This Case 38

C. The Flagrant Nature of the Official Misconduct Precludes the Adoption of an "Impoundment Alternative" 40

CONCLUSION 48

TABLE OF AUTHORITIES

Cases: *Page*

Agnello v. United States,
269 U.S. 20 (1925) 15,36

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 39

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.,
403 U.S. 388 (1971) 46

Boyd v. United States,
116 U.S. 616 (1886) 13

Brown v. Illinois,
422 U.S. 590 (1975) 31,32,42

Chimel v. California,
395 U.S. 752 (1969) 36

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 18

Davis v. Mississippi,
394 U.S. 721 (1969) 37

Dunaway v. New York,
442 U.S. 200 (1979) 31,35,42

Entick v. Carrington,
19 Howell's State Trials 1029 13

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
336 U.S. 271 (1949) 20

Harrison v. United States,
392 U.S. 219 (1968) 31

Johnson v. Louisiana,
406 U.S. 356 (1972) 31

Johnson v. United States,
333 U.S. 10 (1948) 7,15,18,36

Jones v. United States,
357 U.S. 493 (1958) 15,42

McDonald v. United States,
335 U.S. 451 (1948) 16,17,18,36,43,44,46

Mapp v. Ohio,
367 U.S. 643 (1961) 28,36,37

Michigan v. Summers,
____ U.S. ____ , 101 S.Ct. 2587 (1981) 45,46,47

Michigan v. Tucker,
417 U.S. 433 (1974) 10,39,40

Mincey v. Arizona,
437 U.S. 385 (1978) 41,42,45

Miranda v. Arizona,
384 U.S. 436 (1966) 39

Nardone v. United States,
308 U.S. 338 (1939) 29,31

Payton v. New York,
445 U.S. 573 (1980) ..... *passim*

People v. Arnau,
58 N.Y.2d 14 (1982) 32,33,40

People v. Barndt,
199 Colo. 51, 604 P.2d 1173 (1980) 33

People v. Shuey,
13 Cal.3d 835, 120 Cal.Rptr 83, 533 P.2d
211 (1975) 26

Rawlings v. Kentucky,
448 U.S. 98 (1980) 31,43,45

Silverman v. United States,
365 U.S. 505 (1961) 13

Silverthorne Lumber Co., Inc. v. United States,
251 U.S. 385 (1920) 9,30,31,36

State v. Bean,
89 Wash.2d 467, 572 P.2d 1102 (Wash. 1978) 26

State v. Dorson,
615 P.2d 740 (Haw. 1980) 27

State v. Fenin,
154 N.J.Super. 282, 381 A.2d 364 (1977) 33

State v. Matsen,
287 Or. 581, 601 P.2d 784 (Ore. 1979) 26

State v. Ramos,
405 So.2d 1001 (Fla. 1981) 26

Steagald v. United States,
___ U.S. ___ , 101 S.Ct. 1642 (1981) 17,18

Stone v. Powell,
428 U.S. 465 (1976) 35

Taylor v. Alabama,
___ U.S. ___ , 102 S.Ct. 2664 (1982) 31,39

Taylor v. United States,
286 U.S. 1 (1932) 36

Thomas v. Arizona,
356 U.S. 390 (1958) 31

United States v. Agapito,
620 F.2d 324 (2nd Cir. 1980), *cert. den.*, 449
U.S. 834 (1980) 19,23,24,28

United States v. Allard,
634 F.2d 1182 (9th Cir. 1980) 25,34,48

United States v. Bayer,
331 U.S. 274 (1946) 31

United States v. Beck,
662 F.2d 527 (8th Cir. 1981) 33

United States v. Calandra,
414 U.S. 338 (1974) 10,35,36

United States v. Ceccolini,
435 U.S. 268 (1978) 20,31

United States v. Crews,
445 U.S. 463 (1980) 31,32

United States v. Crozier,
674 F.2d 1293 (9th Cir. 1982) 25

United States v. Fitzharris,
633 F.2d 416 (5th Cir. 1980) 33

United States v. Giordano,
416 U.S. 505 (1974) 31

United States v. Griffin,
502 F.2d 959 (6th Cir. 1974), *cert. den.*, 419 U.S.
1050 (1974) 24,25

United States v. Jeffers,
342 U.S. 48 (1951) 36

United States v. Johnson,
___ U.S. ___ , 102 S.Ct. 2579 (1982) 13

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 13,47

United States v. Peltier,
422 U.S. 531 (1975) 39

United States v. Reed,
572 F.2d 412 (2nd Cir. 1978), *cert. den.*, 439 U.S.
913 (1978) 18

United States v. Santana,
427 U.S. 38 (1976) 19

United States v. United States District Court,
407 U.S. 297 (1972) 24

United States v. Williams,
622 F.2d 830 (5th Cir. 1980) 38,39

Vale v. Louisiana,
399 U.S. 30 (1970) 8,20,21,22

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232 U.S. 383 (1914) 35,36

Wolf v. Colorado,
338 U.S. 25 (1949) 12

Wong Sun v. United States,
371 U.S. 471 (1963) 9,29,30,31,34

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Fourth Amendment ..... *passim*

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OPINIONS BELOW

The opinion of the district court (J.A. 3-16) is not reported. The interlocutory opinion of the Court of Appeals (J.A. 17-27) is reported at 663 F.2d 411. The affirmance by the Court of Appeals (J.A. 30-32) is unpublished but is noted at 697 F.2d 300.

JURISDICTION

The Court of Appeals judgment reversing, in part, the district court's suppression of evidence, was entered on November 6, 1981. The Court of Appeals judgment affirming the convictions was entered on June 29, 1982. The petition for a writ of certiorari was filed on August 27, 1982 and was granted on February 22, 1983, limited to Question 1 presented by the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

1. In the month of January, 1981, members of the New York City Drug Enforcement Task Force, which is composed of New York police officers and agents of the federal Drug Enforcement Administration, received information relating to heavy trafficking in cocaine. From January 26, 1981, until the date of their arrest on February 12, 1981, petitioners Segura and Colon were under virtually constant surveillance by the agents (J.A. 3-4). On February 12, 1981, agents followed petitioners from the apartment in which they resided together to a restaurant in Queens, New York, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to two individuals named Rivudalla and Parra (J.A. 18). The agents then followed Rivudalla and Parra, and at approximately 5:30 p.m. stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half a kilogram of cocaine. Rivudalla told the agents that he had received the cocaine on consignment from Segura earlier that day at the restaurant. Originally, Rivudalla was to receive one kilogram of cocaine from Segura, but that plan was reduced to a half of a kilogram because Rivudalla was not sure that he could dispose of an entire kilogram. Finally, Rivudalla told the agents that Segura was to telephone him at approximately 10 p.m. that day (February 12) to discuss Rivudalla's success in disposing of the consigned cocaine[1] (J.A. 10,18).

[1]Because Rivudalla was unavailable at the time of the trial, the conversation between Rivudalla and the agents was not disclosed to the jury.

At approximately 6:30 p.m., Agent Palumbo, the agent in charge of the Task Force, telephoned the United States Attorney's Office for the Eastern District of New York, and requested authority to arrest Segura and Colon and to search their apartment[2] (J.A. 10,18). An Assistant United States Attorney told Agent Palumbo that a search warrant could not be obtained until the following morning because the magistrate "could not be found" (Tr. 154), and that the agents should attempt to arrest Segura and Colon and go to petitioners' dwelling to "secure the premises outside the premises" (Tr. 446-447). The agents received no authorization from the prosecutor to enter petitioners' apartment (J.A. 10,18).

At 7:30 p.m., three agents, led by Agent Shea, went to petitioners' apartment house to set up surveillance. Before going there, Shea and the others had been told by Palumbo, their superior, *not* to enter the suspect apartment (Tr. 295). The agents took up positions on the fire stairs near the door of the apartment, 3D, from where they could see anyone who entered or left the apartment (J.A. 10,18). While there, the agents had no reason to believe that anyone was inside the apartment. No lights were visible underneath the door of the apartment. Agent Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not observed parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 p.m. the agents left the fire stairs to set up surveillance outside the building (J.A. 10, 18-19).

At approximately 11:15 p.m. Segura entered the apartment building alone. The agents followed him into the

[2]Based upon their previous surveillance, the agents knew that Segura and Colon were co-lessees of the apartment.

vestibule in the lobby of the building and arrested him. The entry of Segura into the building and the arrest of him by the agents could not be seen from petitioners' apartment, which was located on the third floor rear of the building (J.A. 10,19). Agent Shea told Segura they were going to "go up to the apartment". Segura denied living in the building, but the agents handcuffed him and forcibly took him to Apartment 3D. At the apartment door, Agent Shea drew his gun but hid it behind his leg (Tr. 336, 402-403). Holding Segura in front of him, Shea knocked on the door, which was answered by a woman unknown to Shea but later identified as petitioner Colon. Agent Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest or search warrant. Nor did any of the officers ask for or receive consent to enter the apartment (J.A. 10-11, 19).

Once inside, the agents discovered three other persons present in addition to Colon. Two of the agents immediately conducted a "security check" to ensure that no one else was present. The "security check" consisted of the agents walking through each room of the apartment and looking into each closet. During this inspection they discovered a triple-beam scale and several jars of lactose in plain view[3] on a bedroom table and numerous small cellophane bags in a bedroom closet (J.A. 19; Tr. 367).

Upon the arrival of Palumbo, Colon and the three other occupants of the apartment were placed under arrest and were shortly thereafter removed, along with Segura, to Drug

[3]The apartment consisted of a living room, kitchen and two bedrooms. The door to the apartment opened onto the living room. These articles were therefore not visible to the agents from the entry way of the dwelling (Tr. 405).

Enforcement Administration headquarters.[4] As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag and discovered a loaded .38 caliber revolver and approximately $2,000 in cash (J.A. 11,19).

At least two agents remained inside the apartment at all times until a search warrant was issued. Because of "administrative delays" and the inability "to get secretarial services", application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day, a period of eighteen hours after the initial unauthorized entry. The application consisted of a two page affidavit prepared by Agent Palumbo, which contained factual misrepresentations in that it omitted mention of the entry by the agents into petitioners' apartment or the observations of the agents while in the apartment (J.A. 28-29). A search warrant was issued at about 6 p.m., some nineteen hours after the initial entry. In the search pursuant to the warrant agents discovered 1,250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition in an eyeglass case, more than $50,000 in cash in a box, and records of purported narcotics transactior on a closet shelf. These items, as well as the scale, lactose and baggies found by the agents the night before, were removed from the apartment and held by the agents to be used as evidence against Segura and Colon (J.A. 11, 18-19).

2. After an evidentiary hearing, the district court granted petitioners' motion to suppress the evidence in its entirety (J.A. 3-16). The district court rested its decision on two

[4]The charges against the three other occupants were subsequently dismissed on motion of the United States Attorney.

grounds. First, it found that the initial warrantless entry could not be justified on the basis of any exceptions to the warrant requirement of the Fourth Amendment. Second, it found that the illegality of the initial entry and arrest of Colon, coupled with the unreasonableness of the delay in securing a search warrant, required the suppression of all the evidence seized from petitioners' dwelling. "To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong" (J.A. 15-16).

3. On appeal by the government to the Court of Appeals, the district court's order was affirmed in part and reversed in part. The Court of Appeals held that the entry into petitioners' dwelling was not justified, and that all items discovered prior to the issuance of the search warrant must be suppressed. However, the court held that the evidence discovered pursuant to the search warrant should not have been suppressed, and could be introduced into evidence at petitioners' trial (J.A. 17-27).

4. The petitioners then proceeded to trial in the district court and were convicted of narcotics offenses.

5. The Court of Appeals affirmed the convictions, rejecting petitioners' contentions that the search warrant was invalid because it was procured on the basis of material misrepresentations and that the convictions were based on insufficient evidence.

SUMMARY OF ARGUMENT

This case raises the important question of whether police may flagrantly and without a warrant enter into and occupy a home, seize evidence, and then cure this misconduct by

obtaining a search warrant almost one full day after the initial illegal entry.

It is petitioners' argument that (1) the initial warrantless entry by the police into their home and the seizure and occupation of it by the police without authorization violated their Constitutional right to be free from unreasonable searches and seizures; (2) the evidence which was seized from their home is irretrievably tainted and that taint cannot be cured by a search warrant obtained almost one full day later but before the evidence was inventoried and removed; and (3) the misconduct by the government officials was so flagrant and abusive that the policies of the exclusionary rule would be served by its application in the instant case in that the police would be deterred from this specific type of misconduct in the future without any hampering of their ability to conduct appropriate criminal investigations.

I

A. The historical context within which the Fourth Amendment was adopted and in which it has been applied by this Court has always shown a special concern for the individual's home as a sanctified place where there is the highest possible expectation of privacy. *See Payton v. New York*, 445 U.S. 573 (1980), and cases cited therein.

It is equally clear that, absent exigent circumstances, the police may not enter a home without first obtaining a warrant from a neutral and detached magistrate. *Johnson v. United States*, 333 U.S. 10 (1948).

The problem in the instant case is that the police acted before they made application to a magistrate and improperly intruded upon and occupied petitioners' home and thereafter attempted to cure this illegality by belatedly obtaining a

warrant. Petitioners argue that such action should be disallowed because it would permit the police to engage in Fourth Amendment violations on whim and then abandon the search or continue it depending not on the law but on whether the search proved successful or not.

B. Petitioner Colon was especially aggrieved by the misconduct in this case in that not only was her home subjected to an unreasonable search and seizure, but her person was violated by the illegal arrest of her at her home without a search or arrest warrant. *Payton v. New York, supra.*

C. Both the district court and the Court of Appeals below properly held that the illegal entry, occupation and seizure in the instant case were not justified by the existence of exigent circumstances. This holding was clearly correct and should not be disturbed by this Court. In sum, the police had no reason to believe that anyone was in the home at the time of the illegal entry nor was there reason to believe that if there were persons on the premises such persons were aware of petitioner Segura's arrest in the lobby of the apartment building so that they might either escape, destroy evidence or pose a threat to the officers or the public.

Indeed, this case does not present any exceptional circumstances which would justify the police misconduct in illegally occupying petitioners' home. The police were advised both by their superior officer, Agent Palumbo, and by an Assistant United States Attorney that they should *not* enter the apartment and they certainly received no consent from any of the occupants to enter. No emergency was occurring on the premises and the police cannot and do not claim that they were in "hot pursuit" of a suspect in entering the home. Finally, there is no claim of imminent removal and/or destruction of evidence. *Vale v. Louisiana,* 399 U.S. 30 (1970).

II

A. The holding of the lower court that the warrantless physical entry and occupation of petitioners' home for almost one full day did not constitute a "seizure" of the contents of the home should not be allowed to stand because it would be contrary to the important policy objectives underlying the Warrant Clause of the Fourth Amendment. Further, it is illogical for the government to argue that even though there was an illegal entry and occupation, a seizure did not occur until the arrival of the warrant. The entire apartment was occupied by the police who sealed off the premises and remained there for nineteen hours free to look around to their hearts' content. If this does not constitute a "seizure" it is difficult to comprehend what would.

Given the facts surrounding the police take-over of petitioners' home, the lack of authorization, and the exorbitant amount of time the police spent in the home, it is argued that the seizure of the home constituted a *per se* seizure of all its contents.

B. Because the contraband seized was primary rather than derivative evidence, the police misconduct cannot be cured by applying the doctrines of "attenuation" and "independent source". *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920).

This is not a case where the long-delayed, *ex post facto*, obtaining of a search warrant could, or did, attenuate the illegality of the initial seizure and continuous occupation. In addition, it is not logical for the government to claim that the warrant constituted an "independent source" for the seizure of the contraband. It is clear that once the police took control of the home and its contents, no "independent source" could

dilute or affect their illegal course of conduct. Thus, no exception to the exclusionary rule exists in the instant case and the rule should be applied to suppress the illegally seized evidence.

III

A. The purpose of the exclusionary rule is the deterrence of police activity that violates the Fourth Amendment. *United States v. Calandra,* 414 U.S. 338 (1974). The objectives of the rule would be achieved by its application herein, particularly in light of the flagrant nature of the official misconduct.

When, as here, one's home was the subject of the illegal entry and occupation, the illegality occurred at night, the police received no authorization to enter from either the United States Attorney or the agent in charge, exigent circumstances were totally lacking, and the illegal occupation lasted for nineteen hours notwithstanding the availability of magistrates and judges in New York City who could readily issue a search warrant, then the exclusionary rule should be applied and the evidence suppressed.

B. The "good-faith" exception to the exclusionary rule does not apply under the facts of this case. Said exception is applicable only when the Fourth Amendment violation is of a technical nature and does not involve deliberate or flagrant activity by law enforcement officials. *Michigan v. Tucker,* 417 U.S. 433 (1974).

C. If this Court should decide that the impounding of a home pending the securing of a search warrant is Constitutionally acceptable, then such doctrine should not be applied in the instant case because the flagrant actions of the police went far beyond the mere impounding of the dwelling.

In particular, the length of time the police occupied the home — nineteen hours — and the fact that the police remained inside the apartment even after all possibility that the evidence would disappear was nonexistent, militate against adopting an "impoundment alternative" on the facts of this case. *See* 2 LaFave, *Search & Seizure, A Treatise on the Fourth Amendment,* sec. 6.5(c) (1978), and cases cited therein.

ARGUMENT

I.

THE ENTRY INTO AND SEIZURE BY DRUG ENFORCEMENT AGENTS OF PETITIONERS' DWELLING WITHOUT A WARRANT AND IN THE ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATED PETITIONERS' FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

A. Belief by the Police that Contraband is Within a Home Does Not Allow Them to Make a Warrantless Entry and Seizure

At the time that the agents entered the home of the petitioners, they possessed neither a search nor an arrest warrant. The entry therefore violated the right of the petitioners "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." U.S. Const., Amend. IV.

The prohibition against unreasonable searches and seizures, embodied in the Fourth Amendment, is a bulwark

against arbitrary governmental interference in our daily lives. It is the matrix upon which our free country was founded.

In pre-Revolutionary Massachusetts, James Otis, representing Boston merchants fighting the issuance of hated writs of assistance, eloquently attacked encroachments on "one of the most essential branches of English liberty [which] is the freedom of one's house. A man's house is his castle. . ." J. Quincy *Reports of Cases Argued in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772*, at 51 (1865). Young John Adams heard Otis in debate and dated the start of the revolution from Otis' impassioned defense of the sanctity of the home. "Then and there," Adams wrote, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." 2 *Legal Papers of John Adams* 142 (L. Wroth and H. Zobel eds. 1965).

The Founding Fathers enshrined the sanctity of the home from arbitrary governmental intrusion in the Fourth Amendment. For over two hundred years its assurances have been the envy of those who would live as free men and women.

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)

The purpose of the Fourth Amendment is to protect the privacy of the individual. Where a person has a reasonable expectation of privacy, the government cannot unreasonably intrude. Of the various places and things in which an individual is accorded a Constitutionally protected right of privacy - his papers, his automobile, his office, his hotel room - none attains the stature of his home. It is quite simply unique in Fourth Amendment jurisprudence. The home is specifically set forth in the Amendment as a place where one may be secure and is at the heart of what the Founding Fathers were trying to protect.

It has been said that at the very core of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961), citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066.

This Court has accordingly always afforded the sanctity of private dwellings the most stringent Fourth Amendment protection. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). *See also Boyd v. United States*, 116 U.S. 66, 630 (1886); *United States v. Johnson*, ____ U.S. ____, 102 S.Ct. 2579, 2589 (1982).

This Court's most recent enunciation of the preeminent position of the home in the hierarchy of values protected by the Fourth Amendment occurred in *Payton v. New York:*

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . .In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the

house." *Payton v. New York*, 445 U.S. 573, 590-91 (1980).

In considering the issues involved in this case, and in balancing the competing individual and governmental interests, this Court must not lose sight of the fact that it was, indeed, the petitioner's *home*, their most sacred zone of privacy, that was violated by the agents' entry and occupation for nineteen hours. No more egregious a desecration of petitioners' Fourth Amendment rights is imaginable.

Petitioners do not contend that the fact that one's home is treated so deferentially under the Fourth Amendment means that it may never be entered by law enforcement officials. When a magistrate signs a search warrant allowing the police to enter one's dwelling, the Fourth Amendment requirements have been met; an impartial magistrate - not a policeman - in a position to weigh the rights of the individual against the legitimate interest of the state has determined that there is probable cause to believe that contraband may be found in the suspect's home. In the instant case, the agents believed, on the basis of their prior observations that day, and their conversation with Rivudalla, that there was cocaine in petitioners' apartment.

The suspicions of the agents were proven to be correct by the actual existence of narcotics in the apartment. But the fact that the police were accurate in their untested beliefs cannot be used as a basis for holding that their entry into and seizure of petitioners' home passes Constitutional muster. It does not.

Over fifty years ago this Court held that "[b]elief, however, well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing

probable cause." *Agnello v. United States*, 269 U.S. 20, 32-33 (1925). *See also Jones v. United States*, 357 U.S. 493, 498 (1958).

Cases abound in which police officers have even a higher degree of suspicion than in the instant case that contraband may be found in a home, yet this Court has abided by its holding that, absent exigent circumstances, the police may not enter a home without the prior approval of a magistrate. For example, in *Johnson v. United States*, 333 U.S. 10 (1948), trained narcotics investigators detected the distinctive odor of opium emanating from a hotel room. Fearful that the evidence might be destroyed or that the occupants of the room might leave before they could secure a search warrant, the police entered the room, seized the opium and arrested the occupants. This Court held that the actions of the police were unlawful, notwithstanding their certainty, based on their expertise in the field of narcotics, that there was opium in the room. In its decision, *per* Justice Jackson, the Court eloquently stated the reason for the Warrant Clause:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers.*" (Emphasis supplied.) 333 U.S. at 13-14.

Similarly, where police heard the sound of adding machines in a dwelling suspected of being a gambling den, they were not justified in making a warrantless entry into the premises. *McDonald v. United States,* 335 U.S. 451 (1948).

Before illegally entering petitioners' apartment, the agents made inquiries of the United States Attorney's Office about obtaining a search warrant. The United States Attorney left no doubt in the mind of Agent Palumbo that a search warrant was necessary before entering the petitioners' apartment. Nonetheless, the police did not actually make application to a magistrate for a warrant until eighteen hours after they illegally entered, seized and continuously occupied the premises. Finally, nineteen hours after seizure of the apartment had been effected, the police obtained the warrant permitting them to enter. Their conduct makes a mockery of the Fourth Amendment. The issuance of the warrant almost a full day and night after the police seized the apartment cannot excuse or nullify the unconstitutional police behavior, and leaves us where Justice Jackson determined we should not be: "in the discretion of police officers".

The purpose of the Warrant Clause is to put the imprimatur of the law upon the government's actions. It is to allow the policeman to say to the suspect: "I am going to enter your house whether you like it or not, but it is not my decision alone. I have the authority of the law in the form of this warrant which I show to you." No such warrant was displayed to the petitioners or to the other three people arrested at their apartment. The agents simply walked in and seized a home, with brute force, under no color or claim of legality.

The government's argument that the police can retroactively obtain a warrant to legitimize their illegal entry and

continued seizure misses the central point of the Warrant Clause's protection: the review by an independent disinterested magistrate must take place *before*, not after, the damage is done.

The obtaining of a warrant *before* the police enter one's dwelling is *not* a ministerial act. "We are not dealing with formalities. The presence of a search warrant serves a high function". *McDonald, supra* at 455. *See also, Payton, supra* at 591 ("Absent exigent circumstances, that threshold [entrance to the house] may not reasonably be crossed without a warrant."); *Steagald v. United States*, ____ U.S. ____ , 101 S.Ct. 1642, 1649 (1981) ("[There is a] constitutional requirement that in the absence of exigent circumstances a warrant must be obtained for a home arrest or a search of the home for objects. . .[I]n such cases the participation of a detached magistrate in the probable cause determination is an essential element of a reasonable search and seizure. . .").

B. The Fourth Amendment Prohibits the Police From Entering a Home Without a Warrant for the Purpose of Making an Arrest.

It is of interest that, even under the common law, the entry to arrest Colon would be illegal. At common law, a constable could only enter a suspect's home to make an arrest if (1) the arrest was for a felony; (2) the constable announced his presence and demanded admission; (3) the entry occurred during daylight hours; and (4) the constable had reasonable grounds to believe that the persons suspected of the crime was present in the house at the time of the entry. *Payton, supra* at 617 (White, J., dissenting).

During the entire time that the agents had petitioners' apartment under surveillance, they had no idea that Colon was home. They had seen no lights, heard no sounds, even with an ear pressed against the apartment door, and had seen no person entering or leaving. Even after the arrival of Segura, the agents had no reason to believe that anyone was in the apartment (J.A. 22). Thus, in the instant case, criteria (3) and (4) for common law home arrests are absent. The entry occurred at nighttime (11:15 p.m.), and the agents had no reasonable belief that Colon was at home (J.A. 12).

Since *Payton,* of course, it is clear that absent exigent circumstances, a search or arrest warrant must be obtained in all circumstances before the police may enter a dwelling to arrest an individual. *Payton, supra; Steagald, supra; United States v. Reed,* 572 F.2d 412 (2nd Cir. 1978), *cert. den.,* 439 U.S. 913 (1978).

Therefore the illegal entry and arrest by the agents violated Colon's constitutional guarantees in two respects: her right to be secure in her *person* from unreasonable seizures, and her right to be free in her *home* from unreasonable searches and seizures.

C. No Exigent Circumstances Were Established Which Would Justify the Warrantless Entry, Occupation and Seizure

The holdings of this Court make clear that barring an emergency, consent, hot pursuit of a suspect, or exigent circumstances, the police may not enter an individual's dwelling without a search warrant or an arrest warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Johnson v. United States, supra; McDonald v. United*

States, supra; United States v. Santana, 427 U.S. 38 (1976).

At the district court and Court of Appeals, the government unsuccessfully attempted to justify the warrantless entry into petitioners' dwelling on the basis of exigent circumstances. The government contended that if the agents had not entered the apartment and arrested Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. (J.A. 12).

Both lower courts examined the evidence in light of *United States v. Agapito,* 620 F.2d 324 (2nd Cir. 1980), *cert. den.,* 449 U.S. 834 (1980), which set forth the preconditions necessary to justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence:

> "[T]he arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." 620 F.2d at 336 n. 18.

Both courts found the police failed to meet either criterion. Specifically, the courts found that the agents were unaware of Colon's presence in the apartment until they entered, and in the words of the district court, "[e]ven if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment *knew of Segura's arrest and was therefore about to destroy evidence.* The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants

of 3D." (Emphasis supplied.) (J.A. 12, 22). The district court noted that there was "no flushing of the toilet, scurrying of feet, nor slamming of doors in agents' faces such as would indicate the imminent destruction of evidence." (J.A. 11).

The determination by both the district court and the Court of Appeals that there were no exigent circumstances is clearly correct, and fully supported by the record, thus obviating the need for review by this Court. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978).

However, should the Court choose to review the question of exigent circumstances, it is submitted that *Vale v. Louisiana*, 399 U.S. 30 (1970), is dispositive of the matter at hand. *Vale* presented a fact pattern much more exigent than that of the instant case, but nevertheless resulted in a similar finding of no exigent circumstances. In *Vale*, the police went to the suspect's house to execute a valid warrant for his arrest. While surveilling the house the police observed the suspect hand over drugs to a person just outside the suspect's house. When the suspect saw the police, he attempted to run back into his house, but was caught by the police in hot pursuit before he reached the premises. The police thereupon entered the suspect's house and found narcotics. This Court held both the entry into the suspect's house and the subsequent search to be illegal, stating that neither the entry nor the search were incident to the suspect's arrest, that there were no exigent circumstances, and that the search cannot be justified solely because narcotics, which are easily destroyed, are involved.

The Court stated that there must be an "exceptional situation" to justify a warrantless entry and search of a

dwelling. The Court identified five such situations: (1) the consent of an occupant; (2) an emergency such as a fire or a violent crime occurring in the premises; (3) the "hot pursuit" of a suspect into the premises; (4) goods in the process of destruction; and (5) goods about to be removed from the jurisdiction. Since the facts in *Vale* met none of the "exceptional situations", the Court declined to "hold that an arrest on the street can provide its own 'exigent circumstances' so as to justify a warrantless search of the arrestee's house." 399 U.S. at 35. The Court so held even though the arrest occurred in a spot readily visible to anyone in the house. *Id.* at 39 (Black, J., dissenting).

Similarly, the facts in the instant case do not support a finding of an "exceptional situation", as both courts below quite properly found.

Quite apart from the issue of claimed exigent circumstances, a comparison of the facts of *Vale* with the instant case is instructive. No doubt the government will make much of the fact that in *Vale,* as opposed to the instant case, the police made an immediate search of the dwelling and removed the contraband that they found, without applying for a search warrant. But in both cases, the police had probable cause to believe that drugs were in the suspect's home, based on their observations on the street. Surely, a magistrate would have issued a search warrant based upon the facts in the *Vale* case.[5] In both cases, the suspect was arrested outside his dwelling and forced to accompany the police inside. In reality, the Fourth Amendment violation in *Vale,* resulting in the suppression of the seized evidence, is less severe than that in the instant case.

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[5]Misapplication of the "independent source" exception to the exclusionary rule would result in an overruling of *Vale.* See: section IIB *infra* at 29 *et seq.*

Here, the agents not only entered unlawfully, but effected lawless arrests of the occupants of the apartment. More importantly, in the instant case the agents continuously violated the petitioners' most sacred zone of privacy - their home - for nineteen hours. The immediate, warrantless removal of the contraband found in petitioners' apartment would have resulted in a less repugnant violation of their Fourth Amendment rights than an occupation of their home, with all the incursions on privacy that that entails. The government's position that this Court should take a *less* stringently disapproving posture in the instant case than what was taken in *Vale* is clearly untenable.

II.

AN AFFIRMANCE OF THE LOWER COURT HOLDING THAT THE EVIDENCE WAS PURGED OF ITS ILLEGAL TAINT MERELY BECAUSE A SEARCH WARRANT WAS OBTAINED BEFORE THE EVIDENCE WAS INVENTORIED OR REMOVED WOULD RENDER THE WARRANT CLAUSE OF THE FOURTH AMENDMENT MEANINGLESS.

A. The Entry Into and Occupation by the Agents of Petitioners' Dwelling for Nineteen Hours Resulted in a *De Facto* Seizure of the Contents of the Home.

After illegally forcing their way into petitioners' apartment, the agents illegally arrested and removed all of the occupants, and then occupied the home for a continuous period of nineteen hours until a search warrant arrived.

Other than making a "security check" by walking through the apartment and looking in all of the closets, the agents testified that they did not conduct a full-fledged search for contraband until the warrant was obtained. Only then, according to their testimony, did they discover the contraband, inventory it, and thereafter remove it from the dwelling.

The Court of Appeals, Second Circuit, held that since the evidence was "discovered" pursuant to the issuance of a valid search warrant, it should not be suppressed (J.A. 26). In so finding, the lower court relied solely on a prior Second Circuit case, *United States v. Agapito, supra.* In *Agapito,* the police illegally entered an empty hotel room and remained there for twenty-four hours awaiting a warrant, after which they opened a suitcase and discovered contraband. In a one paragraph discussion, the *Agapito* court found that although the suitcase had been "seized", it was not searched until the warrant arrived and therefore the contents were admissible in evidence. *Agapito, supra,* 620 F.2d at 338.

It is clear that the Court of Appeals did not carefully consider the issue of "seizure" in either *Agapito* or the instant case. If the lower court can be taken at its word it seems to be suggesting that there is a distinction as a *matter of law* between illegal seizures and illegal searches under the Fourth Amendment. The court clearly stated in *Agapito* that the suitcase was seized *before* any search warrant was obtained. No one has ever argued that the Fourth Amendment prohibition against "unreasonable searches and seizures" applies only to searches. If this Court were to adopt the Second Circuit's view it would have to make such a distinction. It is clear that the Fourth Amendment applies equally to illegal searches *and seizures.* In fact, the

question before this Court, and it should have considered so by the Court of Appeals, is what constitutes a seizure. By any reasonable standard the police, when they occupied the home, were in possession of all of the contents of petitioners' home. It is beyond dispute that the police would not have permitted any of the contents of the apartment to be removed while they occupied it for nineteen hours while awaiting the warrant. Thus the entire contents of the home were under the control and custody of the police.

Certainly, unlawful entry and occupation of a person's home without color of law is precisely the behavior to which the Fourth Amendment is addressed. As this Court has stated, "*physical entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed." (Emphasis supplied.) *United States v. United States District Court,* 407 U.S. 297, 313 (1972). It is the physical presence of the police in the home that is essentially offensive; whether or not the police open a drawer is quite secondary. The fact that the police not only entered unlawfully but lingered for nineteen hours makes the behavior truly repugnant. This Court has never countenanced the type of profoundly offensive police behavior displayed here, and to do so now would sadly diminish the guarantees of the Bill of Rights that we all enjoy.

The Sixth Circuit has reached a decision on the question at hand squarely at odds with *Agapito* and the Second Circuit's decision in the instant case. In *United States v. Griffin,* 502 F.2d 959 (6th Cir. 1974), *cert. den.,* 419 U.S. 1050 (1974), the police had probable cause to search a dwelling, and were already in the process of applying for a search warrant when the entry took place. The police knocked on the door of the dwelling, and when no one answered, went inside, waited four hours for the arrival of the warrant, and

then searched the premises. The Court of Appeals upheld the suppression of the evidence seized from the premises, holding that ". . .police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one. . .[A]ny other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." *Griffin, supra* at 961. The *Griffin* case involves less of an invasion of privacy than the facts in the instant case. In *Griffin,* the police officer was actually in the process of obtaining a search warrant at the time of the illegal entry, the entry occurred during the daytime, and the impoundment of the dwelling lasted only four hours. In the instant case, application for a warrant was not made to a magistrate until eighteen hours after the illegal entry, the entry occurred at nighttime, and the police occupied the petitioners' dwelling for nineteen hours.

The Court of Appeals for the Ninth Circuit likewise was unable to distinguish between the seizure and occupation of a hotel room by the police and the detailed search for and seizure of specific evidence after a search warrant arrived two hours later. The court held ". . .that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant", all evidence seized during the execution of the warrant must be suppressed. *United States v. Allard,* 634 F.2d 1182, 1187 (9th Cir. 1980). *See also, United States v. Crozier,* 674 F.2d 1293 (9th Cir. 1982) (where the police secured a dwelling for six hours before the search warrant arrived, suppression of evidence was granted on the authority of *Allard, supra.*)

In fact, the majority of courts ruling on this issue have refused to separate the initial illegality of the entry and

occupation of the home from the later seizure of contraband under a presumably valid warrant. The California Supreme Court straightforwardly rejected the kind of distinctions being urged on the Court in the instant case:

> "Analytically this case can be regarded simply as involving a de facto, inchoate seizure of the person and property of [the defendant] the moment the police began the illegal occupation. Thereafter the obtaining of the warrant could no more operate to disinfect this conduct than if the police had actually seized the individual items sought to be suppressed prior to acquisition of the warrant." *People v. Shuey,* 13 Cal. 3d 835, 120 Cal. Rptr. 83, 533 P.2d 211 (1975).

Similarly, in *State v. Bean,* 89 Wash.2d 467, 572 P.2d 1102 (Wash. 1978), the Supreme Court of Washington held that "the initial entry into the house was wrongful and a subsequently obtained search warrant was not curative of the original illegal entry." 572 P.2d at 1105.

The Supreme Court of Oregon reached the same conclusion in a case where there was a mere three-and-a-half hour gap between the illegal entry of the police and the obtaining of a warrant. The Court held that the subsequent securing of a search warrant does not affect the validity of the original warrantless entry. *State v. Matsen,* 287 Or. 581, 601 P.2d 784 (Ore. 1979).

A Florida appellate court considered a case with a fact situation similar to the instant one. A defendant was arrested outside his home and was forced to allow the police to enter the dwelling. After a three hour wait, a search warrant was obtained, the police searched the premises, and narcotics were found. It was held that the subsequent warrant did not excuse the illegal initial entry, and the contraband discovered during the post-warrant search must be suppressed. *State v. Ramos,* 405 So.2d 1001 (Fla. 1981).

The Hawaii case *State v. Dorson*, 615 P.2d 740 (Haw. 1980), is notable not only for its holding which supports the contention of the petitioners in the instant case, but also for the analysis employed therein. In *Dorson*, the police entered the dwelling and made a security "walk-through" but did not search the premises. The police agreed with the occupants of the dwelling that, while awaiting a search warrant, the police would depart but would watch the house and its occupants through a window. Anybody who wanted to leave could do so after being subjected to a frisk. Despite the comparative "peacefulness" of the entry and the attenuated nature of the impoundment, the court held that the actions of the police in sealing the premises and of curtailing the occupants' freedom of movement within the house constituted a seizure that could not be cured by the subsequent issuance of a warrant. In suppressing the evidence, the Court eloquently stated the rationale for prohibiting such police action and the dire consequences that would flow from affirming such practices:

> "What the State proposes would necessarily contemplate that any time the police believe they have probable cause to search, however weak the foundation for their belief may turn out to be, they may with impunity intrude upon the privacy of a person's home, so long as they are in the process of applying for a search warrant. And it would make no difference that a judge might later deny their application. To justify such a procedure, it would have to be presumed that where the police believe they have probable cause, the judge reviewing their application will also find probable cause. This obviously, would not necessarily be the case. The potential for mischief and grave injustice is clearly evident and such a practice is not sanctioned by the Fourth Amendment. The seige and immobilization of the house and its occupants which lasted for a period of some seven hours before the search warrant arrived was patently inexcusable." *State v. Dorson*, supra at 740.

The court thus engaged in a uniform analysis found in all cases in which the police enter and occupy a dwelling in the hope and expectation a warrant will eventually issue: the police have made a decision, prior to violating the privacy of the home, that probable cause existed for a search. If they are correct, the magistrate will simply issue a warrant, a search will be conducted, and a court may, as the Second Circuit did in the instant case, choose to disregard the Constitutional infirmities of the police behavior. But what happens if the magistrate disagrees with the police, fails to find probable cause and refuses to issue a warrant? Do the police merely apologize to the occupants of the dwelling for police-state tactics and sheepishly depart? Trespass and false arrest actions against officers who make unlawful searches and seizures "are mainly illusory remedies." *Mapp v. Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J., concurring). Every reason which was advanced by this Court in determining that the exclusionary rule was necessary to make real the safeguards of the Fourth Amendment pertain to the instant case.

An additional point must be made of the particular facts of the instant case, in contradistinction to the fact situations that obtain in *every* pre-warrant impoundment case save for *Agapito, supra,* both those holding for and against petitioners' contention in the instant case: in all cases, save for *Agapito, supra,* the police occupied the home substantially less than nineteen hours. Even if the Court decides that it is possible to seize the home and not seize its contents, it does not follow that every such "seizure" of every home no matter what the circumstances will not at some point become a seizure sufficient to invoke the Constitutional protection of the Fourth Amendment. A nineteen hour occupation of a home might well be considered a *per se* seizure of the

contents of the dwelling that an after-acquired warrant cannot cure, leaving aside what decision might be reached if a shorter time period is involved.

B. The Doctrines of "Attenuation" and "Independent Source" Cannot be Invoked Because the Contraband Seized Was Primary Rather Than Derivative Evidence.

The courts holding against the petitioners' position have misapplied the doctrines of "attenuation" and "independent source" to pre-warrant seizure situations.

The attenuation doctrine was first set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963). There this Court examined fully the "fruit of the poisonous tree" doctrine earlier enunciated in *Nardone v. United States*, 308 U.S. 338 (1939), *i.e.*, ". . .knowledge gained by the government's own wrong cannot be used by it simply because it is used derivatively."

In police work, perhaps even more than in other areas of life, one fact leads to another: "A" leads the police to "B" which leads to "C", etc. In *Wong Sun*, the Court wrestled with the question of whether given the illegality of "A", derivative evidence "B", "C", etc., should also be suppressed. *Wong Sun* rejected a "but-for" rule that evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Instead, *Wong Sun* enunciated the following test for the admissibility of derivative evidence under the exclusionary rule:

> "[W]hether granting establishment of the primary illegality, the evidence to which instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (Citation omitted) *Wong Sun, supra* at 487-88.

In *Wong Sun,* defendant Toy made statements to federal agents and the statements were held inadmissible against him. The statements led the agents to defendant Yee and at Yee's home the agents found narcotics which were introduced at trial against Toy. Toy and Yee in turn led the agents to Wong Sun. In reversing Toy's conviction this Court held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery. Using the same test, the Court further held that Wong Sun's confession was not tainted by his illegal arrest, since he had been released on his own recognizance after a lawful arraignment and had returned to the police station voluntarily several days later to make the statement. His confession therefore had been come at by means sufficiently distinguished and separate from any exploitation of police illegality so as to be purged of the primary taint.

Another doctrine used by the government to overcome the exclusionary rule is the so-called "independent source" doctrine of *Silverthorne Lumber Co., Inc. v. United States,* 251 U.S. 385 (1920). In that case the government had illegally seized the petitioner's corporate books and documents. The government photographed the items before returning them and used the photographs as a basis to subpoena the petitioner to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. Writing for the Court, Justice Holmes stated:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it

> shall not be used at all. *Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others,* but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (Emphasis supplied.) *Silverthorne, supra* at 392.

Even though the material could have legally been subpoenaed had the government known of its existence from a nontainted source, once the government embarks on an illegal course of conduct the illegality cannot be attenuated by an otherwise lawful subpoena: "The rights . . . against unlawful searches and seizures are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne, supra* at 392.

The *Wong Sun* and *Silverthorne* doctrines have been used by this Court only in determining whether the Court should suppress *derivatively* obtained evidence. A typical attenuation case deals with a confession arising out of an unreasonable arrest or other illegal police activity: *Wong Sun v. United States, supra; Brown v. Illinois,* 422 U.S. 590 (1975); *Dunaway v. New York,* 442 U.S. 200 (1979); *Rawlings v. Kentucky,* 448 U.S. 98 (1980); *Taylor v. Alabama,* ____ U.S. ____, 102 S.Ct. 2664 (1982); *United States v. Bayer,* 331 U.S. 274 (1946); *Thomas v. Arizona,* 356 U.S. 390 (1958); *Harrison v. United States,* 392 U.S. 219 (1968). Other attenuation cases deal with evidence derivatively obtained from illegal wiretaps: *Nardone v. United States, supra; Lanza v. New York,* 370 U.S. 139 (1962); *United States v. Giordano,* 416 U.S. 505 (1974). *See also, Johnson v. Louisiana,* 406 U.S. 356 (1972) (lineup); *United States v. Crews,* 445 U.S. 463 (1980) (in-court identification); *United States v. Ceccolini, supra* (witness found as a result of an illegal search).

All attenuation cases pose the following question: "[W]hether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews, supra* at 472. Put another way, it has been said that "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown v. Illinois, supra* at 610 (Powell, J., concurring).

The lower court cases that have allowed the admission into evidence of contraband seized under a warrant obtained after an illegal initial entry have generally been decided on a misapplication of two complimentary theories: first, that the illegal police entry into a dwelling does not encompass the "seizure" of the later-discovered contraband; and second, that subsequently obtained search warrants provide an "independent source" for the search of the dwelling and the seizure of the evidence.

In the recent case of *People v. Arnau,* 58 N.Y.2d 14 (1982), an undercover officer bought cocaine from the defendant at the defendant's apartment. While there, the officer observed a large quantity of narcotics. A half hour later, the police entered defendant's home and handcuffed him to a radiator. Although the police made a security check for other occupants, "no search for evidence was conducted at that time and no evidence was discovered or seized." *Arnau,* supra at 30. Four hours later, a warrant was signed and then executed after being displayed to the defendant, at which time the contraband was discovered. The court held that the contraband was not "seized" until it was discovered and therefore was not subject to the exclusionary rule:

> "Since there is not the slightest hint that the search warrant was in any way tainted by the illegal entry or that the police exploited the entry in an effort to obtain evidence, we hold that the evidence seized is not the fruit of the poisonous tree and that the exclusionary rule is, therefore, inapplicable to this case." *Arnau, supra,* at 33.

The *Arnau* court held that the "independent source" exception to the exclusionary rule applied:

> "We believe that . . . where the evidence sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity, it should be admissible and not subject to a *per se* rule of exclusion based solely on the unlawful conduct." *Arnau, supra* at 35.

See also, United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980) (independent source): *United States v. Beck,* 662 F.2d 527 (8th Cir. 1981) (close question as to exigent circumstances; independent source); *State v. Fenin,* 154 N.J. Sup. 282, 381 A.2d 364 (1977) (independent source); *People v. Barndt,* 199 Colo. 51, 604 P.2d 1173 (1980) (no "seizure" until warrant arrived).

Arnau, supra, and the above cited lower court cases are distinguishable from the instant case in two ways: first, the impoundment of the dwelling in those cases was always for a short period of time, usually just a few hours; and second, in most of the cases the arrestee remained in his home until the warrant arrived, a fact which would tend to deter the police from conducting a full-fledged search before the arrival of the warrant.

What is particularly disturbing about the cases adverse to petitioners' position is that they all misapply the doctrine of attenuation, and in so doing greatly diminish the protection afforded by the Fourth Amendment. *See, Arnau, supra* at 40-41 (dissenting opinion).

In the instant case, the doctrine of attention can only be properly applied if this Court decides that the contraband was not actually "seized" until the search warrant arrived, nineteen hours after the agents illegally entered and seized petitioners' dwelling. But such a holding would render the Warrant Clause of the Fourth Amendment meaningless. Under the attenuation doctrine as applied to pre-warrant impoundment cases, the result would be the uniform finding of an "independent source" for the discovery of the contraband, to wit, the knowledge the police lawfully possessed before they illegally entered the home. If the *Wong Sun* theory is applied to such cases, it would not matter how many hours, days, or weeks the police occupied the dwelling, just so long as they eventually obtained a search warrant, based on probable cause that existed before their illegal activity, and waited for that warrant before actually opening the containers bearing the contraband. Under the "independent source" theory, a warrant would never be required so long as the police had probable cause to believe that there was contraband in a suspect's home; the "independent source" would always be the information the police had legally acquired before embarking on their unconstitutional conduct. A result which serves to make the Fourth Amendment a nullity must surely be rejected:

> "Mechanical application of the traditional *Wong Sun* 'independent source' analysis where a search warrant is subsequently commissioned albeit supported by an affidavit that relies upon independent evidence, would allow police officers to treat the warrant requirement as merely an *ex post facto* formality." *United States v. Allard, supra* at 1185, n. 3.

III.

THE POLICE ACTION WAS SO FLAGRANTLY ABUSIVE OF PETITIONERS' RIGHTS, AND SO LACKING IN GOOD FAITH, THAT AN "IMPOUNDMENT ALTERNATIVE" SHOULD BE REJECTED, THE EXCLUSIONARY RULE SHOULD BE APPLIED, AND THE EVIDENCE SEIZED SHOULD BE SUPPRESSED.

A. The Purposes of the Exclusionary Rule Would Be Achieved By Its Application In This Case.

In *Weeks v. United States,* 232 U.S. 383 (1914), this Court established the exclusionary rule: evidence obtained in violation of a person's Fourth Amendment rights must be suppressed in federal cases:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures. . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks, supra* at 391-92.

Historically, the exclusionary rule derived from two policies: deterring police misconduct and maintaining the integrity of the courts. *Dunaway v. New York, supra* at 217-18. In recent years, deterrence has become the predominant rationale for the rule, *United States v. Calandra,* 414 U.S. 338, 348 (1974), and concern with preserving the integrity of the judicial process has receded in importance. *Stone v. Powell,* 428 U.S. 465 (1976). In cases of disgraceful police

misconduct, however, such as obtains in the instant case, the rationale of judicial integrity has singular force.

The exclusionary rule was adopted, quite simply, because other measures theoretically available were found not to be effective in deterring police behavior that was violative of the Fourth Amendment. *Mapp v. Ohio, supra.*

Though arising in a context of past police misconduct, in essence the rule looks forward: it is designed to deter the police from violating the Constitutional rights of the people *in futuro.* "The [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel v. California,* 395 U.S. 752, 766, n. 12 (1969).

The exclusionary rule has not been utilized by this Court in all cases where there are Fourth Amendment violations. Its most fundamental application is in cases like the one at bar where the police behavior has been outrageous, when both the need for deterrence and the probability of its success are high. "As with any remedial device, the application of the rule has been restricted to those cases where its remedial objectives are thought most efficaciously served." *United States v. Calandra, supra* at 349.

Notwithstanding the *Calandra, supra,* language referring to a restricted application of the rule, this Court has never failed to invoke the rule in the suppression of primary, *i.e.,* non-derivative evidence unlawfully seized from a dwelling or other premises without a warrant. *See, for example, Weeks v. United States, supra; Silverthorne Lumber Company, Inc. v. United States, supra; Agnello v. United States, supra; Taylor v. United States,* 286 U.S. 1 (1932); *Johnson v. United States, supra; United States v. Jeffers,* 342 U.S. 48 (1951); *McDonald v. United States, supra; Mapp v. Ohio, supra; Payton v. New York, supra.*

The elements of police misbehavior herein add up to a

disgraceful and purposeful disregard of the safeguards of the Fourth Amendment. The warrantless forced entry of the police into petitioners' dwelling, at nighttime, after asking for and failing to receive authorization from the United States Attorney; the absence of exigent circumstances; the seizure and occupation of the premises for an exorbitant amount of time; the fact that a warrant was easily obtainable — all these facts virtually shout out for the invocation of the exclusionary rule. The contraband illegally seized at petitioners' apartment is admittedly extremely probative of their guilt. But the fact that it is perhaps more trustworthy and reliable than oral or other kinds of evidence does not remove it from the protection of the Fourth Amendment and the sanction of the exclusionary rule:

> "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes." *Davis v. Mississippi*, 394 U.S. 721, 724 (1969).

The guilt or innocence of an individual in a criminal proceeding is of extreme importance, never more so than in these times when fear of crime is endemic. But it is more important surely that all of us live as free men and women, safe in our homes from lawless government intrusion.

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio, supra* at 659.

It is important to recognize that the Court is not facing a form of police conduct which has any defenders. No one argues that the police should disobey their supervisors and violate the Fourth Amendment; no one argues that it is necessary to enter illegally without a warrant in the absence of exigent circumstances. In fact, it is not at all clear that anyone claims that the number of times that the police engage in this particular form of misconduct is very great. It would be hard to argue, therefore, that this police conduct either warrants protection or needs any protection. This Court is being asked to disallow the police from violating the Fourth Amendment in an egregious and indefensible manner which serves no useful purpose, and in a way that can only discredit the police and the criminal justice system.

B. The "Good-Faith" Exception to the Exclusionary Rule Does Not Apply In This Case.

The best known exposition of the so-called "good-faith" exception to the exclusionary rule appears in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). In *Williams*, a federal agent who had previously arrested the defendant in Ohio and knew that defendant's appeal bond restricted her movements to within that State happened to observe the defendant at the Atlanta airport. The agent arrested her for violation of the bond and uncovered narcotics during a search incident to the arrest. Although a question was raised as to the authority of the agent to make the arrest, the court held that technical legal deficiencies of the arrest would not in any event give rise to application of the exclusionary rule to the contraband:

> "[W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by

> officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule cases, its application must cease also." *Williams, supra* at 840.

To date, this Court has not adopted a "good-faith" exception. *Taylor v. Alabama,* ____ U.S. ____, 102 S.Ct. 2664 (1982). Nonetheless, the Court in several cases has mentioned good faith as germane to its decision.

In *United States v. Peltier,* 422 U.S. 531 (1975), for example, the Court held that *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), a case limiting the power of roving border patrols to stop people, need not be applied retroactively. The Court felt that the "imperative of judicial integrity", one of the underpinnings of the exclusionary rule, would not be offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law, even if later cases hold that such conduct is not permitted. *Peltier, supra* at 538-39.

In *Michigan v. Tucker,* 417 U.S. 433 (1974), this Court suggested that the nature and willfullness of the proscribed police activity should be carefully examined to see whether the prime purpose of the exclusionary rule, deterrence, would be achieved by the exclusion of the illegally seized evidence. In *Tucker,* the evidence in question was the testimony of a witness whose name had been supplied to the police by the accused after an interrogation in which the police failed to advise the accused completely of his *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436 (1966), had been decided in the period between Tucker's arrest and his trial.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Tucker, supra* at 488.

It is imperative to note that the good-faith exception has only been applied to technical violations of a defendant's rights; all are cases in which the police behavior has been impeccable. But the instant case is not one where, for example, the police possessed a warrant that they believed to be valid but that later turned out to be wrongly issued by a magistrate. This is not a case where, for example, the police misunderstood the law, or were applying a statute that was at a later time declared unconstitutional. The deprivation of petitioners' rights herein indeed resulted from "willful, or at the very least negligent" conduct of law enforcement officials, and the good-faith exception has absolutely no application to the instant case.

C. The Flagrant Nature of the Official Misconduct Precludes the Adoption of an "Impoundment Alternative"

It is petitioners' contention, as fully set forth above, that absent exigent circumstances, the police may not Constitutionally enter a dwelling without a warrant. In contrast, *Arnau, supra, et al.*, by misapplying the doctrine of "independent source" would allow the police under *any*

circumstances to enter premises pending the arrival of a hoped-for warrant.

Between the two lies the "impoundment alternative", an exception to the warrant requirement which would allow police to, *under certain circumstances,* secure premises in anticipation of a search warrant. 2 La Fave, *Search & Seizure,* sec. 6.5(c) (1978).

Although this Court has never recognized impoundment as an exception to the warrant requirement, there was a suggestion of a legitimate role for impoundment in *Mincey v. Arizona,* 437 U.S. 385 (1978). In holding that a warrant was necessary to search a home, even if it were the scene of a murder, the court stated:

> "There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. *Indeed, the police guard at the apartment minimized that possibility.*" (Emphasis supplied). *Mincey, supra* at 395.

It is important to note that *Mincey* was decided before *Payton, supra,* and that therefore the police in *Mincey* entered the premises lawfully in order to carry out a lawful arrest.

Unlike the instant case, the guard alluded to in *Mincey* had an irrefutable justification for remaining there: they were guarding suspects while awaiting arrival of homicide detectives who under Arizona law had responsibility for investigating the incident. More crucially, the limited impoundment alluded to by the Court could be seen as justifiable because the warrant could *not* have been obtained *earlier.* In *Mincey* a homicide had occurred during the course of a lawful arrest. If as suggested by the Court, while police officers were guarding the wounded suspects, others swiftly procured a warrant, in fact a warrant would have been

obtained at the earliest possible time. In short, the situation in *Mincey* is entirely at odds with the facts in the instant case.

An impoundment exception to the Warrant Clause would necessitate in each case an evaluation of the flagrancy of police behavior. Clearly, whatever the merits of the impoundment alternative may be, its use in this case would be totally unwaranted. The flagrant nature of the police misconduct calls instead for application of the exclusionary rule, which is of singular importance where the "purpose and flagrancy of the official misconduct" can be deemed particularly offensive to the Constitution. *Brown v. Illinois*, 422 U.S. 590, 605 (1975). *See also, Brown, supra* at 611 (Powell, J., concurring); *Dunaway v. New York, supra* at 227 (Rehnquist, J., dissenting).

The examples of flagrancy in this case are both numerous and substantial:

1. The illegal intrusion was into a home, the most clearly defined zone of privacy protected by the Fourth Amendment. *Payton v. New York, supra.*

2. The illegal entry occurred at nighttime, when an individual has the greatest expectation of privacy from governmental intrusion. *Jones v. United States*, 357 U.S. 493, 498 (1958).

3. The agents entered the dwelling without a warrant even though there was sufficient time and opportunity to obtain one. At the time that Agent Palumbo telephoned the United States Attorney, at 6:30 p.m., the facts upon which the agents would rely in obtaining a warrant were already known to them (J.A. 10,18). The warrantless entry occurred almost five hours later, at 11:15 p.m. (J.A. 10).

"Administrative delay" is absolutely no excuse for the failure to secure a warrant before entry. "No reason, except inconvenience of the officers and delay in preparing papers

and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement . . ." *McDonald, supra* at 455.

The agents' failure to secure the required warrant must be viewed in light of the Federal Rules of Criminal Procedure, as amended in 1977, which provide for the issuance of search warrants by telephone. F.R.C.P. Rule 41(c)(2). The obvious purpose of this provision is to shorten the time necessary to obtain a warrant. No reason has been given by the government for its failure to utilize this provision.

The Eastern District of New York, wherein the crime occurred, is one of the most populous judicial districts in the country. It encompasses all of Brooklyn, Queens, and Staten Island in New York City, and the counties of Nassau and Suffolk on Long Island. There are thirteen district court judges assigned to the district, as well as four magistrates. Furthermore, F.R.C.P. Rule 41(a) provides that a warrant may be issued by a judge of a state court of record within the district. There were, at the time of this incident, a total of 447 state court judges within the Eastern District of New York. Surely the government's answer that the magistrate "could not be found" (Tr. 154) is an unacceptable excuse for the failure to obtain a warrant. In *Rawlings v. Kentucky,* 448 U.S. 98 (1980), the police in Bowling Green, Kentucky, were able to obtain a search warrant within forty-five minutes of their determination that such a warrant was needed. Certainly the agents in New York City could have done as well. It is ludicrous for the government to ask this Court to accept a delay of nineteen hours. The agents could have, and should have, secured a warrant before the illegal entry.

Professor La Fave, in his discussion of the impoundment

alternative, makes it very clear that time is of the essence in a determination of the validity of the impoundment:

> "The intrusion takes on a greater degree of offensiveness as time passes, and thus it would seem that the promptness with which a warrant may be obtained is a highly relevant consideration. It may be said, then, that the impoundment procedure is most likely to pass muster if utilized in conjunction with an oral search warrant process, whereby the telephone may be utilized to obtain a prompt magisterial determination as to whether a search may be undertaken." 2 La Fave, *supra* at 454.

4. The agents who impounded the apartment demonstrated their willful and flagrant disregard of the Constitution by disobeying the orders of the prosecutor and the agent in charge. The Assistant United States Attorney directed Agent Palumbo to have his men "secure the premises *outside* the premises". (Emphasis supplied) (Tr. 446-47). Furthermore, Agent Palumbo directed the agents *not* to enter the apartment (Tr. 295). The actions of the agents in entering without any shred of authorization, indeed, flying in the face of Agent Palumbo's admonishment to the contrary, shows a complete lack of "good-faith" and instead indicates a flagrant disregard for the seriousness of Fourth Amendment protections.

5. The entry was forcible. At least one of the agents had his gun drawn at the time of the entry. No request was made of petitioner Colon or any of the other occupants of the apartment for permission to enter (J.A. 10-11, 19). This action alone warrants application of the exclusionary rule. "Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality." *McDonald, supra* at 459 (Jackson, J., concurring).

6. All of the occupants of the apartment were illegally arrested and removed from the premises. True, the petitioners have no standing to complain of the police action against the other three persons in the apartment, but the agents' treatment of the occupants provides additional evidence of the police-state tactics employed. Charges were of course dismissed against the three other occupants several days after their arrest. The police behavior here can be contrasted to that in *Rawlings v. Kentucky, supra,* where police were legally on the premises and visitors who were detained for a short period of time while awaiting the arrival of a search warrant were given the option of leaving if they would consent to a body search.

Similarly, the government may not invoke *Michigan v. Summers,* ____ U.S. ____ , 101 S.Ct. 2587 (1981), to justify the police behavior in the instant case. In *Summers,* the police had a search warrant when they entered the dwelling and detained the occupants while a proper search was conducted, in contrast to the instant case where there was no warrant and the occupants were not merely detained but were arrested and removed from the premises.

7. The agents remained in the dwelling alone for nineteen hours, exerting full dominion and control over the apartment and its contents. The violation of petitioners' rights was intensified by this lengthy impoundment. The fact that the petitioners were in police custody did not lessen their rights of privacy in their entire apartment. *Mincey v. Arizona, supra* at 392.

Not only did the actions of the agents prevent the normal use of the dwelling for an absurdly extended period of time, but the agents were left *alone* to rummage around as they pleased.

The police took the precaution of illegally arresting and

removing all of the occupants — who might indeed have observed what the agents did or did not do for nineteen hours. This flagrant action by the law enforcement officials prejudiced petitioners' ability to support their motion to suppress the evidence and to defend themselves at trial. *See Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 430 U.S. 388, 426 (1971) (Appendix to opinion of Burger, C.J., dissenting).

In short, we have only the agents' word that the apartment was not completely searched and the contraband discovered until after the search warrant was obtained. These were the very officers who had entered without a warrant in knowing and cynical disregard of Fourth Amendment rights. Moreover, as set forth, *infra*, the application by these officers for a search warrant — when, at long last this was initiated — was less than a full and truthful document.

Therefore, we must take with a grain of salt the account of what actually transpired and did not transpire during the nineteen long hours of the agents' occupation. Unfortunately, "history shows that the police acting on their own cannot be trusted." *McDonald, supra* at 456. The same reason that the Warrant Clause of the Fourth Amendment requires a magistrate to pass on the desires of the police to enter a persons' home militates against the Court's permitting the police to occupy a person's home with the expectation that the police will observe the Constitutional niceties.

The Court has accepted the proposition that special circumstances, including the prolonged nature of an intrusion, may be considered in assessing Constitutional implications of police behavior. Thus, in *Michigan v. Summers, supra,* where it was held that a search warrant carries with it the limited authority to detain the occupants of the premises while a proper search is conducted, it was

suggested that ". . . special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case. . ." *Summers, supra* at 2595. Although *Summers* referred to the detention of persons rather than the "detention" of a person's home and belongings, the same reasoning may be applied to the seizure of a home, since "the sanctity of private dwellings (is) ordinarily afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte,* 428 U.S. 543, 561 (1976). Certainly nineteen hours is a "prolonged detention" and demonstrates the "purpose and flagrancy" of the official misconduct.

Even if an impoundment procedure is permitted by this Court, the agents had no right to remain *inside* the apartment once they had completed their security check and removed all occupants therefrom:

> "It does seem clear . . . that if the only risk is loss of evidence by someone thereafter entering the premises, then the police may not take the more intrusive step of making entry into the premises and guarding it from within while a search warrant is obtained." 2 La Fave, *supra* at 452.

8. The search warrant affidavit omitted mention of the entry by the agents into the petitioners' apartment and failed to include any observations of the agents while in the apartment (J.A. 28-29). Although the lower courts found that the warrant was valid (J.A. 13, 31-32), the act of omission by the law enforcement officials of course resulted in the magistrate's being misled and served to debase his Fourth Amendment function. By deliberately withholding the fact of the ongoing seizure from the magistrate, the agents and the United States Attorney thus "eviscerate(d) the very purpose of the warrant requirement which is to place a neutral magistrate between the public and police conduct."

United States v. Allard, supra at 1187. Even if the Court adopts an impoundment exception, clearly the facts do not support its application here.

* * * * * *

The extent of the police illegality in this case, the entry into a home, at night, without consent and without a warrant, the impounding and remaining in the home for nineteen hours, are inexcusable. Such behavior is the quintessential lawlessness which the Founding Fathers did their best to prevent in drafting the Fourth Amendment: the midnight banging on the door by police acting in total and cynical disregard of basic human rights. The hope of vigorously enforcing the Fourth Amendment can only be achieved by telling the government in the clearest possible language that outrageous police conduct cannot and will not be tolerated.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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